



United States Department of the Interior

OFFICE OF THE SOLICITOR

MAR 29 1996

Memorandum

To: Ada E. Deer, Assistant Secretary - Indian Affairs

From: Robert T. Anderson, Associate Solicitor
Division of Indian Affairs

Subject: Application to Take Land into Trust in Lawton, Oklahoma for the Fort Sill Apache Tribe of Oklahoma

INTRODUCTION

The Fort Sill Apache Tribe of Oklahoma has requested that the Assistant Secretary--Indian Affairs approve its application to take land into trust and reverse the decision by the Anadarko Area Director declining to take land into trust for the Fort Sill Apache Tribe on the former reservation of the Kiowa, Comanche and Apache Tribes of Oklahoma ("KCA").

The Fort Sill Apache Tribe, a separate federally-recognized Tribe from the Apache Tribe of Oklahoma, entered into an agreement with Robert Rowell, an enrolled Kiowa Indian, to operate a bingo enterprise near Lawton, Oklahoma on Rowell's trust allotment. The trust allotment is located within the former KCA reservation and was originally allotted to a member of the Comanche Tribe. This agreement was in response to the September 17, 1992, letter from the Area Director to Robert Rowell advising him that operation of an unlicensed gaming facility violates the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-21 (1988). The Fort Sill Apache Tribe subsequently sought BIA approval to lease the trust land from Mr. Rowell. No formal action was taken by the BIA. Relying on the representation of the Superintendent that tribal ownership of the land would allow the Fort Sill Apache Tribe to conduct gaming, the Fort Sill Apache Tribe ceased its bingo operation and initiated the process of acquiring the land in trust in order to resume operations. The Fort Sill Apache Tribe requested that the Bureau of Indian Affairs approve the sale of the trust land to it. In 1993, the Superintendent of the Anadarko Office refused to take the land in trust for the Fort Sill Apache Tribe, finding that the Tribe failed to obtain the consent of all three of the KCA Tribes as mandated by 25 C.F.R. § 151.8. The Area Director affirmed the decision of the Superintendent that 25 C.F.R. § 151.8 required the consent of the Tribes with jurisdiction over the land. Because not all the KCA Tribes consented to the trust acquisition, the Area Director found that the Fort Sill Apache Tribe could not acquire the land in trust for Class II gaming (the Kiowa and Apache Tribes consented but the Comanche Tribe refused to consent).¹

¹ We note that in 1981 the Assistant Secretary -Indian Affairs waived the regulations at 25 C.F.R. § 120a.8 requiring tribal consent, for nonmember individual Indian acquisitions

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The Fort Sill Apache Tribe submitted a second request in 1994 which was denied by the Superintendent of the Anadarko Office in June, 1995, and the denial was affirmed by the Area Director, based on the same rationale as the 1993 denial, i.e., the Fort Sill Apache Tribe did not receive the consent of the Comanche Tribe to take the land into trust. The Fort Sill Apache Tribe requested that the Area Office forward their request to take land into trust to the Central Office of the Bureau of Indian Affairs in Washington, D.C. The Office of the Secretary has requested that our office review the legal implications and feasibility of taking the land into trust for the Fort Sill Apache Tribe.

BACKGROUND

The members of the Fort Sill Apache Tribe, who descended from the Chiricahua and Warm Springs bands of Apache Indians, were given allotments in 1912 and 1913 on the KCA reservation. These individuals were moved from their home in Arizona to various prisoner-of-war camps, the last being the Fort Sill Military Reservation in Oklahoma, which was carved out of the KCA reservation.² The members of the Fort Sill Apache Tribe have thus lived within the former KCA reservation for many years.

We note that the Fort Sill Apache Tribe is small with few resources and a very small land base. Their history as prisoners of war settled in Oklahoma is compelling. Their prospects for tribal economic development are small to nonexistent since they have no current projects and no future prospects other than the proposed gaming operation. The ability of the Tribe to provide needed services to its members is limited by the severe economic circumstances of the Tribe. The history of the Fort Sill Apache Tribe and its desperate economic situation presents a persuasive case for intervention by the Central Office.

The Supreme Court has held that Indian tribes are possessed of sovereignty over "their members and their territory." *Montana v. United States*, 450 U.S. 544 (1981). There is a presumption in favor of tribal jurisdiction over all land within reservations and over dependent Indian communities. See *Indian Country, U.S.A., Inc. v. Oklahoma*, 829 F.2d 967 (10th Cir. 1987), cert. denied, sub nom., *Oklahoma Tax Comm. v. Muscogee (Creek) Nation*, 487 U.S. 1218 (1988); see also *De Coteau v. District Court for Tenth Judicial Dist.*, 420 U.S. 425 (1975); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987); *Alaska ex rel.*

because it would "place individuals in your area at a disadvantage when attempting to have their lands accepted in a trust status." The Assistant Secretary found that it was in the best interest of the Indian people to waive the regulations at 25 C.F.R. § 120a.8 insofar as it related to individual Indian trust acquisitions; however, the waiver was limited and did not extend to tribal acquisitions.

² In 1897 the KCA Tribes relinquished 26,987 acres of their reservation to the United States to be used for military purposes and "for the permanent location of the Apache prisoners of war." See Executive Order Signed by President Grover Cleveland, February 26, 1897.

Yukon Flats School Dist. v. Native Village of Venetie, 856 F.2d 1384, 1390 (9th Cir. 1988). See generally F. Cohen, *Handbook of Federal Indian Law* at 229-59 (1982 ed.). The Fort Sill Apache Tribal members were placed within the boundaries of the former KCA reservation by the federal government and the Tribe exercises jurisdiction over its members and its tribal facilities.

APPLICATION OF 25 C.F.R. § 151.8 TO THE KCA IN OKLAHOMA

The Department of Interior has issued regulations governing trust acquisitions within a reservation. These regulations define a reservation in the State of Oklahoma as "that area of land constituting the former reservation of the tribe as defined by the Secretary." See 25 C.F.R. Part 151.2(f). The regulations further provide that:

[a]n individual Indian or tribe may acquire land in trust status on a reservation other than its own only when the governing body of the tribe having jurisdiction over such reservation consents in writing to the acquisition . . .

See 25 C.F.R. § 151.8. The situation of the four tribes in this case is uncommon and not squarely addressed by the regulations. This case does not present the situation, apparently contemplated in the regulations, where a tribe seeks to acquire trust land on a reservation wholly controlled by a different tribe. While the KCA area fits within the definition of a reservation under Section 151.2(f), in our opinion, 151.8 cannot be easily or automatically applied to trust acquisitions by any of the four tribes on the KCA reservation as there is no single "governing body" of a tribe that has "jurisdiction over the reservation." Each of the tribes, including the Fort Sill Apache Tribe, has jurisdiction over some areas of the reservation.³ Any trust acquisition by the KCA Tribes or the Fort Sill Apache Tribe on the KCA reservation is not "on another tribe's reservation." Accordingly, there is no need for the four tribes to seek the consent of all the others in order to acquire land in trust within the former KCA reservation. As with any tribally-owned trust land, jurisdiction over land that is transferred to any of the four tribes rests with the acquiring Tribe.⁴

Finally, land may be acquired for a tribe in trust status when the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing. See 25 C.F.R. § 151.3(a)(3). We have previously noted the economic plight of the Fort Sill Apache Tribe, which inhibits its ability to provide services to its members and

³ The Kiowa, Comanche and Apache Tribes jointly own some tracts of land within the former reservation. These tracts are administered by a land-use planning board.

⁴ Nothing herein should be construed as affecting the Area Director's decision on appeal to the Interior Board of Indian Appeals in *Horse v. Anadarko Area Director*, BIA, No. IBIA 96-50-A (filed Jan. 9, 1996) (Challenging the Area Director's denial to take land into trust).

to exercise its right of self-determination. The Secretary's authority to take land in trust for the Fort Sill Apache Tribe of Oklahoma is clear and 25 C.F.R. § 151.8 in our opinion does not limit the Tribe's ability to acquire such land on the former KCA reservation. The written approval of the Kiowa Tribe, of which Mr. Rowell is a member, was appropriately sought and has been instrumental in the Secretary's decision.³

The Secretary's duties also include approval of the "sale of . . . individual-owned trust or restricted lands." See 25 C.F.R. § 152.22. The Secretary's role in the transfer of the Rowell allotment in Lawton, Oklahoma to the Fort Sill Apache Tribe is to determine that Rowell receives fair market value and that the sale is in his best interest. Execution of the Secretary's trust responsibility to the individual landowner are separate and apart from the Part 151 trust acquisition of the Fort Sill Apache Tribe. See *Mitchell v. United States*, 463 U.S. 206 (1983).

APPLICATION OF § 2719 OF THE IGRA TO THIS TRUST ACQUISITION

The Fort Sill Apache Tribe desires to obtain this tract of land in order to conduct gaming. The Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-21 (1988), prohibits gaming on trust land acquired subsequent to October 17, 1988. An exception to the general prohibition allows gaming on Indian lands acquired after October 17, 1988 if an Indian Tribe "had no reservation on October 17, 1988 and [its] lands are located in Oklahoma and are within the Indian Tribe's former reservation, as defined by the Secretary." 25 U.S.C. § 2719(a)(2)(a)(i). This trust acquisition fits the exception. The Fort Sill Apache had no reservation in October 1988, the land is located in Oklahoma, and the land is located within the Tribe's former reservation, as defined by the Secretary. Accordingly, the Fort Sill Tribe may conduct Class II gaming on the property.

CONCLUSION

It is our opinion that the consent of the other tribes pursuant to 25 C.F.R. § 151.8 is not required for the Fort Sill Apache Tribe to acquire land in trust on its own (the KCA) reservation. We also advise that any decisions you render in this case regarding the sale of the trust land and the acquisition of the land in trust for the Fort Sill Apache Tribe be final for the Department. See 25 C.F.R. §§ 2.6(c), 2.20(c); *Ute Mountain Ute Tribe v. Acting Assistant Secretary for Indian Affairs*, 11 IBIA 168 (1983).

³ We note that under § 151, the Secretary has broad discretion over whether to acquire land in trust for a tribe and that the views of other tribes may be considered.